IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 29TH MARCH 2007 / 8TH CHAITHRA 1929

RSA.No. 1295 of 2005()

AS.153/2001 of I ADDL.SUB COURT, KOZHIKODE
OS.119/1999 of PRL.M.C.KOZHIKODE-I

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APPELLANT/APPELLANT/3RD DEFENDANT

THEKKEDATH SURESH KUMAR,
S/O.BHARGAVI AMMA, P.O.THIRUTHIYAD,
P.O.THIRUTHIYAD, KALATHINKUNNU AMSOM DESOM,
KOZHIKODE TALUK.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENTS: RESPONDENTS/PLAINTIFFS & DEFENDANTS 1,2,4 & 5

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1. THEKKEDATH SUMILA DEVI,
D/O.BHARGAVI AMMA, "SREESARAJ",
CHEVAYOOR AMSOM AND DESOM, KOZHIKODE TALUK-17.

2. THEKKEDATH BHARGAVI AMMA,
D/O.KALLIYANI AMMA, KLATHINKUNNU AMSOM DESOM,
P.O.THIRUTHIYAD, KOZHIKODE-673 004.

3. THEKKEDATH SUNANDA DEVI,
D/O.BHARGAVI AMMA, AMBADI, PARAMBIL BAZAR P.O.,
KURUVATTOOR AMSOM, PARAMBIL DESOM,
KOZHIKODE TALUK.

4. THEKKEDATH SATHEESH KUMAR,
S/O.BHARGAVI AMMA, KALATHINKUNNU AMSOM DESOM,
P.O.THIRUTHIYAD, KOZHIKODE-673 004.

5. THEKKEDATH RAMESH KUMAR,
S/O.BHARGAVI AMMA, KALATHINKUNNU AMSOM DESOM,
P.O.THIRUTHIYAD, KOZHIKODE-673 004.

BY ADV. SRI.P.S.SREEDHARAN PILLAI
SMT.C.G.PREETHA
SRI.M.PRAVEESH

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 29/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CMP NO. 2836/2006 IN R.S.A.1295 OF 2005

DIMMISSED

29.3.2007 SD/- M.SASIDHARAN NAMBIAR, JUDGE

lgk

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No.1295 OF 2005

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DATED THIS THE 29th DAY OF MARCH, 2007

JUDGMENT

The third defendant in O.S.119 of 1999 on the file of Munsiff Court, Kozhikode is the appellant. First respondent is the plaintiff and other respondents, the other defendants. The suit was filed seeking partition and separation of the one-sixth share due to the first respondent. The preliminary decree was passed for dividing item No.1 to 3 of plaint schedule properties into six equal shares and to allot one share each to plaintiff and defendants. The preliminary decree was challenged before Sub Court, Kozhikode in A.S.153 of 2001. Learned Sub Judge confirmed the decree and dismissed the appeal. It is challenged in this second appeal. The second appeal was admitted forumulating the following substantial question of law.

"Whether item No.1 of plaint B schedule property which is the family house is partible at the instance of the plaintiff, a female member, when the said house is in occupation of the widow of the intestate as also the appellant/third defendant, his wife and children in view of Section 23 of the Hindu Succession Act, despite the other children of the intestate having shifted

their residence from the family house?”

2. The learned counsel appearing for the appellant and first respondent were heard.

3. The second appeal was admitted only on the substantial question of law based on Section 23 of Hindu Succession Act which prohibits a female heir from seeking a share in the family house till the male heirs choose to divide it. The question was directly considered by this court in Narayanan V. Meenakshi (2006(1)KLT 210). By Hindu Succession Amendment Act 2005(Act 39 of 2005) Section 23 of the Hindu Succession Act was deleted. Therefore no right could be claimed by a male heir based on the repealed Section 23. The only question is whether it would affect the right which already accrued and was upheld by either the trial court or the first appellate court. The learned Single Judge in Narayan's case answered that question following the dictum of the Apex Court in Lekh Raj V. Muni Lal and others (JT 2001(2) SC 317) as follows:-

> “Therefore, whenever the personal right of a male heir under Section 23 comes to an end the right of female heir to claim partition cannot be defeated. In other words, a defeasible

> right of a male heir would get defeated the moment his personal right ceases. Such personal right of a male heir is taken away by the omission of Section 23 of Hindu Succession Act 1956, by the Hindu Succession Act 2005. The effect of such omission would be retroactive".

The learned Single Judge further held that the Amendment Act would act retroactive and the changed law could be taken note of and applied in pending litigations including second appeal. In view of the law, claim of the appellant that the preliminary decree passed by the courts below is not sustainable, as it was the first respondent female heir who had chosen to partition the family house and therefore the decree is not sustainable can only be rejected. Appeal fails. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-